



## 5 CFR Chapter VIII

### Prohibited Personnel Practices, Disclosures of Information Evidencing Wrongdoing, FOIA, Privacy Act, and Disability Regulations to Conform with Changes in Law and Filing Procedures and Other Technical Changes

**AGENCY:** U.S. Office of Special Counsel.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Office of Special Counsel (OSC) proposes to revise its regulations regarding the filing of complaints and disclosures with OSC, to update the prohibited personnel practice provisions, Freedom of Information Act (FOIA) provisions, Privacy Act provisions, provisions concerning nondiscrimination based on disability, and to make other technical revisions. These revisions are intended to streamline OSC's filing procedures and reflect changes in law.

**DATES:** Interested parties should submit comments to the Office of Special Counsel at one of the addresses shown below on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*] to be considered in the formulation of a final rule.

**ADDRESSES:** You may submit comments by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [frliaison@osc.gov](mailto:frliaison@osc.gov). Include "FY2022 Proposed Reg Comments" in the subject line of the e-mail.

Comments received may be posted to <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Susan Ullman, General Counsel, U.S. Office of Special Counsel, by telephone at 202-804-7000, or by e-mail at *sullman@osc.gov*.

**SUPPLEMENTARY INFORMATION:**

**Background**

OSC is proposing to revise its regulations pursuant to OSC's authority at 5 U.S.C. 1212(e).

**I. Changes concerning the filing of complaints and disclosures of information evidencing wrongdoing**

The proposed rulemaking adds a new scope and purpose section at 5 CFR 1800.1 and redesignates the current §§ 1800.1-1800.3 as §§ 1800.2-1800.4 respectively. The proposed rule revises the language at the new § 1800.2(c)(1) through (5) and (d), and § 1800.3(b)(1) and (2) by replacing references to various OSC complaint forms with references to a general complaint form established by OSC, currently "Form 14," that OMB approved on March 6, 2020. The proposed rule also adds a paragraph at the new § 1800.2(c)(3) to define when a complaint contains sufficient information for OSC to investigate the allegations.

**II. Changes concerning prohibited personnel practices and Hatch Act**

The proposed rulemaking updates the prohibited personnel practice provisions to use more consistent terminology throughout. It also amends new § 1800.2(a)(9) to conform with amendments made to 5 U.S.C. 2302(b)(9)(D) by the Follow the Rules Act, Pub. L. No. 115-40, and sec. 1097(c)(1)(A) of Pub. L. No. 115-91. It also adds two new paragraphs at the new § 1800.2(a)(13)-(14), based on amendments made to 5 U.S.C. 2302(b)(13)-(14) which concern the use of agency nondisclosure agreements and the access of employee medical files in

furtherance of a different PPP. The proposed rulemaking also moves the procedures for filing a Hatch Act complaint and requesting a Hatch Act advisory opinion into the same section.

### **III. Changes concerning disclosures of information evidencing wrongdoing**

The proposed rulemaking amends the new § 1800.3(a) to add language from sec. 110 of the Whistleblower Protection Enhancement Act of 2012, which clarified that censorship of scientific or technical information could qualify as a type of agency wrongdoing under 5 U.S.C. 2302(b)(8).

### **IV. Clarification of OSC's investigative authority**

Based on sec. 1097(a) of Pub. L. No. 115-91, the proposed rulemaking adds a new section at 5 CFR 1810.2 to clarify OSC's right to timely access to all agency records, even if those records contain privileged information. Providing privileged information to OSC does not waive the agency's privilege with respect to nongovernment third parties. OSC is required to submit a report to Congress if an agency fails to comply with a request for documents from OSC. The proposed rule adds a new section at 5 CFR 1810.3 based on sec. 1097(f) of Pub. L. No. 115-91, which delineates OSC's authority to promptly terminate investigations if certain criteria are met. Finally, the proposed rule adds a new section at 5 CFR 1810.4 that states that, to protect the integrity of an OSC investigation, agencies should use liaisons that do not have perceived or actual involvement with the personnel actions at issue.

### **V. Changes concerning FOIA and Privacy Act regulations**

The proposed rule revises OSC's FOIA regulations at part 1820 by updating the various methods for making a FOIA request, defining "unusual circumstances," and clarifying that no fees will be assessed if OSC fails to make a timely

response. The proposed rule also revises OSC's Privacy Act regulations by creating several new sections at 5 CFR part 1830 to add a scope and purpose section, a definitions section, and other sections concerning the management of records at OSC.

## **VI. Changes concerning the enforcement of nondiscrimination provisions**

The proposed rule revises OSC's regulations implementing the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments to the Rehabilitation Act, codified at subchapter V of chapter 16 of title 29 of the U.S. Code, to update various definitions, processes, and procedures.

### **Procedural Determinations**

*Administrative Procedure Act (APA):* This action is taken under the Special Counsel's authority at 5 U.S.C. 1212(e) to publish regulations in the *Federal Register*.

*Executive Orders 12866 and 13771:* This proposed rule is not a regulatory action under Executive Order (E.O.) 13771 because OSC does not anticipate that this proposed rule will have significant economic impact, raise novel issues, and/or have any other significant impacts. Thus, this proposed rule is not a significant regulatory action under section 3(f) of E.O. 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of the Order.

*Congressional Review Act (CRA):* OSC has determined that this proposed rule is not a major rule under the Congressional Review Act, as it is unlikely to result in an annual effect on the economy of \$100 million or more; is unlikely to result in a major increase in costs or prices for consumers, individual industries, federal, state, or local government agencies or geographic regions; and is unlikely to have a significant adverse effect on competition, employment, investment,

productivity, or innovation, or on the ability of U.S.-based enterprises to compete in domestic and export markets. Pursuant to 5 U.S.C. 801(a), OSC will transmit a copy of the proposed rule to each House of the Congress and the Comptroller General.

*Regulatory Flexibility Act (RFA)*: The Regulatory Flexibility Act does not apply, even though this proposed rule is being offered for notice and comment procedures under the APA. This proposed rule will not directly regulate small entities. OSC therefore need not perform a regulatory flexibility analysis of small entity impacts.

*Unfunded Mandates Reform Act (UMRA)*: This proposed revision does not impose any federal mandates on state, local, or tribal governments, or on the private sector within the meaning of the UMRA.

*National Environmental Policy Act (NEPA)*: This proposed rule will have no physical impact upon the environment and therefore will not require any further review under NEPA.

*Paperwork Reduction Act (PRA)*: This rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the PRA.

## **List of Subjects**

### **5 CFR Parts 1800 and 1810**

Administrative practice and procedure.

### **5 CFR Parts 1820 and 1830**

Archives and records, Reporting and recordkeeping requirements.

### **5 CFR Part 1850**

Administrative practice and procedure, Buildings and facilities, Equal employment opportunity, Federal buildings and facilities, Individuals with disabilities.

**Approved:** January 21, 2022.

**Travis G. Millsaps,**

*Deputy Special Counsel for Public Policy.*

For the reasons stated in the preamble, the U.S. Office of Special Counsel proposes to amend chapter VIII of title 5 of the Code of Federal Regulations as follows:

1. Revise part 1800 to read as follows:

**PART 1800—FILING OF COMPLAINTS AND ALLEGATIONS**

Sec.

1800.1 Scope and purpose.

1800.2 Filing complaints of prohibited personnel practices or other prohibited activities.

1800.3 Filing disclosures of information evidencing wrongdoing.

1800.4 Filing complaints of Hatch Act violations and requesting advisory opinions.

Authority: 5 U.S.C. 1212(e).

**§ 1800.1 Scope and purpose.**

The purpose of this part is to implement the U.S. Office of Special Counsel's (OSC) authorities at 5 U.S.C. 1212-1216. This part does not create new individual rights but instead is intended to inform individuals of filing options they may be entitled to under 5 U.S.C. 1212-1216, and 2302. Individuals are encouraged to go to OSC's website at <https://osc.gov> at for more information about the OSC complaint form that should be used when filing with OSC.

**§ 1800.2 Filing complaints of prohibited personnel practices or other prohibited activities.**

(a) *Prohibited personnel practices.* Pursuant to 5 U.S.C. 1214 and 1215, OSC has investigative and prosecutorial jurisdiction over allegations that one or more

of the following prohibited personnel practices were committed against current or former Federal employees and applicants for Federal employment:

(1) Discrimination, including discrimination based on marital status or political affiliation (see § 1810.1 of this chapter for information about OSC's deferral policy for discrimination complaints);

(2) Soliciting or considering improper recommendations or statements about any individual requesting, or under consideration for, a personnel action;

(3) Coercing political activity, or engaging in retaliation for refusal to engage in political activity;

(4) Deceiving or obstructing any individual with respect to competition for employment;

(5) Influencing any individual to withdraw from competition to improve or injure the employment prospects of another individual;

(6) Granting an unauthorized preference or advantage to any individual to improve or injure the employment prospects of another individual;

(7) Nepotism involving a covered relative as defined at 5 U.S.C. 3110(a)(3);

(8) Retaliation for whistleblowing (whistleblowing is generally defined as the disclosure of information by an individual who reasonably believes that the information evidences a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or the integrity of the scientific process if the censorship will cause one of the aforementioned categories of wrongdoing);

(9) Retaliation for:

(i) Exercising certain grievance, complaint, or appeal rights;

(ii) Providing testimony or other assistance to any individual exercising such grievance, complaint, or appeal rights;

(iii) Cooperating with the Special Counsel, an Inspector General, or any other agency component responsible for internal investigation or review; or

(iv) Refusing to obey an order that would require the violation of law, rule, or regulation;

(10) Discrimination based on conduct that would not adversely affect job performance;

(11) Violating a veterans' preference requirement;

(12) Taking or failing to take a personnel action in violation of any law, rule, or regulation implementing or directly concerning merit system principles at 5 U.S.C. 2301(b);

(13) Implementing or enforcing any nondisclosure policy, form, or agreement that fails to include the statement found at 5 U.S.C. 2302(b)(13) or fails to inform any individual that they retain their whistleblowing rights; and

(14) Accessing the medical record of any individual as part of, or otherwise in furtherance of, any other prohibited personnel practice.

(b) *Other prohibited activities.* Pursuant to 5 U.S.C. 1216, OSC also has investigative and prosecutorial jurisdiction over any allegation concerning the following:

(1) Prohibited political activity by Federal employees covered by the Hatch Act at title 5 of the U.S. Code, chapter 73, subchapter III;

(2) Prohibited political activity by State and local officers and employees covered by the Hatch Act at title 5 of the U.S. Code, chapter 15;



(3) Arbitrary and capricious withholding of information prohibited under the Freedom of Information Act at 5 U.S.C. 552 (except for certain foreign and counterintelligence information);

(4) Activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decision-making;

(5) Involvement by any employee in any prohibited discrimination found by any court or appropriate administrative authority to have occurred in the course of any personnel action (unless OSC determines that the allegation may be resolved more appropriately under an administrative appeals procedure); and

(6) Pursuant to 38 U.S.C 4324, violations of the Uniformed Services Employment and Reemployment Rights Act, codified at 38 U.S.C. 4301, et seq.

(c) *Procedures for filing complaints alleging prohibited personnel practices or other prohibited activities (other than the Hatch Act).* (1) Anyone may file a complaint with OSC alleging one or more prohibited personnel practices, or other prohibited activities within OSC's investigative jurisdiction. The OSC complaint form must be used to file all such complaints.

(2) OSC will not process a complaint filed in any format other than the completed OSC complaint form designated in paragraph (c)(1) of this section. If a complainant does not use this form to submit a complaint, OSC will provide the complainant with information about the form. The OSC complaint form will be considered to be filed on the date on which OSC receives a completed form.

(3) The OSC complaint form requests that the complainant provide basic information about the alleged prohibited personnel practices or other prohibited activities. A complaint may be amended to clarify or include additional allegations. A complaint is sufficient for investigation when OSC receives

information identifying the parties, identifying any relevant personnel action(s), and describing generally the practices or activities at issue.

(4) The OSC complaint form is available:

(i) Online at: <https://osc.gov> (to print out and complete on paper, or to complete online);

(ii) By writing to OSC at: Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505; or

(iii) By calling OSC at: (800) 872-9855 (toll-free), or (202) 804-7000 (in the Washington, DC area).

(5) A complainant can file a completed OSC complaint form:

(i) Electronically at: <https://osc.gov>;

(ii) By e-mail to: [info@osc.gov](mailto:info@osc.gov); or

(iii) By mail to: Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

### **§ 1800.3 Filing disclosures of information evidencing wrongdoing.**

(a) *General.* Pursuant to 5 U.S.C. 1213, OSC is authorized to provide an independent and secure channel for use by current or former Federal employees and applicants for Federal employment to disclose information that they reasonably believe evidences wrongdoing by a Federal agency. OSC must determine whether there is a substantial likelihood that the information discloses a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; a substantial and specific danger to public health or safety; or censorship related to scientific research or the integrity of the scientific process if the censorship will cause one of the aforementioned categories of wrongdoing. If it does, the law requires OSC to refer the information to the appropriate agency head for an investigation and a written report on the

findings to the Special Counsel. It is OSC's policy to maintain the anonymity of individual filers throughout the disclosure process, unless they consent to their identity being revealed. The law does not authorize OSC to investigate any disclosure.

(b) *Procedures for filing disclosures.* Current or former Federal employees and applicants for Federal employment may file a disclosure of the type of information described in paragraph (a) of this section with OSC. Such disclosures must be filed in writing.

(1) Filers are encouraged to use the OSC complaint form to file a disclosure of the type of information described in paragraph (a) of this section with OSC. This form provides more information about OSC jurisdiction, and procedures for processing whistleblower disclosures. The OSC complaint form is available:

(i) Online at: <https://osc.gov> (to print out and complete on paper, or to complete online);

(ii) By writing to OSC at: Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505; or

(iii) By calling OSC at: (800) 572-2249 (toll-free), or (202) 804-7004 (in the Washington, DC area).

(2) Filers may use another written format to submit a disclosure to OSC, but the submission should include:

(i) The name, mailing address, and telephone number(s) of the individual(s) making the disclosure(s);

(ii) The department or agency, location, and organizational unit complained of; and

(iii) A statement as to whether the filer consents to disclosure of the filer's identity by OSC to the agency involved, in connection with any OSC referral to that agency.

(3) An individual can file a disclosure with OSC:

(i) Electronically at: <https://osc.gov>;

(ii) By e-mail at [info@osc.gov](mailto:info@osc.gov); or

(iii) By mail to: Office of Special Counsel, Disclosure Unit, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

**§ 1800.4 Filing complaints of Hatch Act violations and requesting advisory opinions.**

(a) *Procedures for filing complaints alleging Hatch Act violations.* (1)

Complainants are encouraged to use the OSC complaint form to file Hatch Act complaints. The OSC complaint form is available:

(i) Online at: <https://osc.gov> (to print out and complete on paper, or to complete online); or

(ii) By writing to OSC at: Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(2) Complaints alleging a violation of the Hatch Act may be submitted in any written form, and should include:

(i) The complainant's name, mailing address, and telephone number (unless the matter is submitted anonymously);

(ii) The department or agency, location, and organizational unit complained of; and

(iii) A concise description of the actions complained about, names and positions of employees who took the actions, if known to the complainant, and

dates of the actions, preferably in chronological order, together with any documentary evidence that the complainant can provide.

(3) A written Hatch Act complaint can also be filed with OSC:

(i) By e-mail to: [hatchact@osc.gov](mailto:hatchact@osc.gov); or

(ii) By mail to: Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(b) *Procedures for requesting Hatch Act advisory opinions.* Pursuant to 5 U.S.C. 1212(f), OSC is authorized to issue advisory opinions only about political activity of Federal officers and employees, and political activity of State or local officers and employees. An individual can seek an advisory opinion from OSC:

(1) By e-mail to: [hatchact@osc.gov](mailto:hatchact@osc.gov);

(2) By mail to: Office of Special Counsel, Hatch Act Unit, 1730 M Street NW, Suite 218, Washington, DC 20036-4505; or

(3) By phone at: (800) 854-2824 (toll-free), or (202) 804-7002 (in the Washington, DC area).

2. Revise part 1810 to read as follows:

**PART 1810—INVESTIGATIVE AUTHORITY OF THE SPECIAL COUNSEL**

Sec.

1810.1 Investigative policy in certain discrimination and retaliation complaints.

1810.2 Access to agency information in investigations.

1810.3 Termination of certain OSC investigations.

1810.4 Investigative policy regarding agency liaisons.

Authority: 5 U.S.C. 1212(e).

**§ 1810.1 Investigative policy in certain discrimination and retaliation complaints.**

OSC is authorized to investigate allegations of discrimination and retaliation prohibited by law, as defined in 5 U.S.C. 2302(b)(1) and (b)(9)(A)(ii). Because procedures for investigating discrimination and retaliation complaints have

already been established in the agencies and the Equal Employment Opportunity Commission, OSC will usually avoid duplicating those procedures and will defer to those procedures rather than initiating an independent investigation.

**§ 1810.2 Access to agency information in investigations.**

(a) Pursuant to 5 U.S.C. 1212(b)(5), OSC is authorized to have timely access to all agency records, data, reports, audits, reviews, documents, papers, recommendations, information, or other material that relate to an OSC investigation, review, or inquiry.

(b) A claim of common law privilege, such as the attorney-client privilege, may not be used by any agency, or officer or employee of any agency, to withhold information from OSC. By providing such information to OSC, an agency will not be deemed to have waived the common law privilege against a non-Federal entity or against any individual in any other proceeding.

(c) In the event of contumacy or failure of an agency to comply with any request under this section, the Special Counsel shall submit a report to the committees of Congress with jurisdiction over OSC and the applicable agency.

**§ 1810.3 Termination of certain OSC investigations.**

(a) Pursuant to 5 U.S.C. 1214(a)(6), within 30 days of receiving a complaint alleging that a prohibited personnel practice occurred, OSC may terminate an investigation of the allegation without further inquiry if:

(1) The same allegation, based on the same set of facts and circumstances, had previously been:

(i) Made by the individual and investigated by OSC; or

(ii) Filed by the individual with the Merit Systems Protection Board;

(2) OSC does not have jurisdiction to investigate the allegation; or

(3) The individual knew or should have known of the alleged prohibited personnel practice more than 3 years before the allegation was received by OSC.

(b) Within 30 days of terminating an investigation described in paragraph (a) of this section, OSC shall notify the individual, in writing, of the basis for terminating the investigation.

#### **§ 1810.4 Investigative policy regarding agency liaisons.**

Agency liaisons facilitate their agency's cooperation with OSC's investigations by ensuring that agencies timely and accurately respond to OSC's requests for information and witness testimony, as well as by assisting with the resolution of complaints. To maintain the integrity of OSC's investigations and to avoid actual or perceived conflicts, agency liaisons should not have current or past involvement in the personnel actions at issue in the assigned case.

3. Revise part 1820 to read as follows:

### **PART 1820—FREEDOM OF INFORMATION ACT REQUESTS; PRODUCTION OF RECORDS OR TESTIMONY**

Sec.

1820.1 General provisions.

#### **Subpart A—FOIA Regulations**

1820.2 Requirements for making FOIA requests.

1820.3 Consultations and referrals.

1820.4 Timing of responses to requests.

1820.5 Responses to requests.

1820.6 Appeals.

1820.7 Fees.

1820.8 Business information.

1820.9 Other rights and services.

#### **Subpart B—Touhy Regulations**

1820.10 Scope and purpose.

1820.11 Applicability.

1820.12 Definitions.

1820.13 General prohibition.

1820.14 Factors OSC will consider.

- 1820.15 Service of requests or demands.
- 1820.16 Requirements for litigants seeking documents or testimony.
- 1820.17 Processing requests or demands.
- 1820.18 Restrictions that apply to testimony.
- 1820.19 Restrictions that apply to released records.
- 1820.20 Procedure when a decision is not made prior to the time a response is required.
- 1820.21 Fees.
- 1820.22 Final determination.
- 1820.23 Penalties.
- 1820.24 Conformity with other laws.

Authority: 5 U.S.C. 552, 301, and 1212(e).

## **§ 1820.1 General provisions.**

This part contains rules and procedures followed by the U.S. Office of Special Counsel (OSC) in processing requests for records under the Freedom of Information Act (FOIA), codified at 5 U.S.C. 552. These rules and procedures should be read together with the FOIA and the FOIA page of OSC's Web site (<https://osc.gov/FOIA>), which set forth additional information about access to agency records and information routinely provided to the public as part of a regular OSC activity. For example, forms, press releases, records published on OSC's Web site, or public lists maintained at OSC headquarter offices pursuant to 5 U.S.C. 1219, may be requested and provided to the public without following this part. This part also addresses responses to demands by a court or other authority to an OSC employee or former employee for production of official records or testimony in legal proceedings.

### **Subpart A—FOIA Regulations**

## **§ 1820.2 Requirements for making FOIA requests.**

(a) *Submission of requests.* (1) A request for OSC records under the FOIA must be made in writing. The request must be sent:

(i) By e-mail to: [foiarequest@osc.gov](mailto:foiarequest@osc.gov) or other electronic means described on the FOIA page of OSC's Web site (<https://osc.gov/FOIA>);



(ii) Electronically to: The National FOIA Portal for the entire federal government at [www.foia.gov](http://www.foia.gov); or

(iii) By mail to: U.S. Office of Special Counsel, FOIA Officer, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(2) Both the request letter and envelope or e-mail subject line should be clearly marked "FOIA Request."

(3) A FOIA request will not be considered to have been received by OSC until it reaches the FOIA Officer.

(b) *Description of records sought.* Requests must state in the letter, e-mail, or other prescribed electronic method the words "FOIA Request" or "FOIA/Privacy Request." The request must also describe the records sought in enough detail for them to be located with a reasonable amount of effort. When requesting records about an OSC case file, the case file number, name, and type (for example, prohibited personnel practice (PPP), Hatch Act, USERRA, Hatch Act advisory opinion, or whistleblower disclosure) should be provided, if known. Whenever possible, requests should describe any particular record sought, such as the date, title or name, author, recipient, and subject matter. OSC requires proof of identification from requestors seeking their own case files. OSC requires a signed release of information from requestors seeking another individual's case file.

(c) *Agreement to pay fees.* By making a FOIA request the requestor agrees to pay all applicable fees chargeable under § 1820.7 unless the Special Counsel waives fees, the requestor is exempt, or the requestor otherwise qualifies for a waiver of fees.

### **§ 1820.3 Consultations and referrals.**

When OSC receives a FOIA request for a record in its possession, it may determine that another Federal agency or entity is better able to decide whether the record is exempt from disclosure under the FOIA. If so, OSC will either respond to the request for the record after consulting with the other Federal agency or entity or refer the responsibility for responding to the request to the other Federal agency or entity deemed better able to determine whether to release it. OSC will ordinarily respond promptly to consultations and referrals from other Federal agencies or entities.

**§ 1820.4 Timing of responses to requests.**

(a) *In general.* OSC ordinarily will respond to FOIA requests in order of receipt. In determining which records are responsive to a request, OSC ordinarily will include only records in its possession on the date that it begins its search. OSC will inform the requestor if it uses any other date.

(b) *Multitrack processing.* (1) OSC may use two or more processing tracks to distinguish between simple and more complex requests based on the amount of work and/or time estimated to process the request.

(2) When using multitrack processing, OSC may provide requestors in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of the faster track(s).

(c) *Expedited processing.* (1) OSC will take requests and appeals out of order and provide expedited treatment whenever OSC has established to its satisfaction that:

(i) Failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;

(ii) An urgency exists to inform the public about an actual or alleged federal government activity and the requestor is primarily engaged in disseminating information; or

(iii) The requestor with a personal interest in a case for which they face an imminent filing deadline with the Merit Systems Protection Board or other administrative tribunal or court of law in an individual right of action, or in a USERRA case referred to OSC under title 38 of the U.S. Code. Expedited status granted under this provision will apply only to the following requested records: PPP case closure and notice of appeal rights letters sent to the complainant by OSC, and the official complaint form submitted to OSC by a USERRA complainant or the original referred USERRA complaint if referred to OSC under title 38 of the U.S. Code.

(2) A request for expedited processing must be made in writing and sent to OSC's FOIA Officer. The expedited request is deemed received when it reaches the FOIA Officer.

(3) A requestor who seeks expedited processing must submit a statement, certified to be true and correct to the best of that individual's knowledge and belief, explaining in detail the basis for requesting expedited processing. OSC may waive a certification as a matter of administrative discretion.

(4) OSC shall decide whether to grant a request for expedited processing and notify the requestor of its decision within ten (10) calendar days of the FOIA Officer's receipt of the request. If OSC grants the request for expedited processing, it will process the request as soon as practicable. If OSC denies the request for expedited processing, OSC shall rule expeditiously on any administrative appeal of that decision.

(d) *Aggregated requests.* OSC may aggregate multiple requests by the same requestor, or by a group of requestors acting in concert, if it reasonably believes that such requests actually constitute a single request that would otherwise create “unusual circumstances” as defined in § 1820.5, and that the requests involve clearly related matters.

#### **§ 1820.5 Responses to requests.**

(a) *General.* Ordinarily, OSC has twenty (20) business days from receipt to determine whether to grant or deny a FOIA request.

(1) In unusual circumstances, OSC may extend the twenty (20) business-day deadline by written notice to the requestor setting forth the unusual circumstances justifying the extension. OSC shall notify the requestor if OSC cannot process the request in 20 days and provide the requestor an opportunity to modify the request so that OSC can process the request within the 20-day time limit. OSC and the requestor can also negotiate an alternative time frame for processing the request or modified request. OSC’s FOIA Public Liaison is available to assist in the resolution of any disputes between the requestor and OSC. OSC must also advise the requestor of the requestor’s right to seek dispute resolution services from the National Archives and Records Administration’s (NARA) Office of Government Information Services (OGIS). OSC may consider a requestor’s refusal to reasonably modify the request or to negotiate an alternative time frame as a factor in determining whether unusual and/or exceptional circumstances exist.

(2) *Unusual circumstances* means—

(i) The need to search for and collect the requested records from OSC field offices, NARA storage facilities, or other locations away from OSC’s FOIA office;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records demanded in a single request; or

(iii) The need for consultation and/or referral with another OSC unit where the information also concerns two or more components of OSC or with a Federal entity that has an interest in the information requested.

(3) *Exceptional circumstances* means—

(i) OSC has a backlog of pending requests and is making reasonable progress in reducing the backlog; and

(ii) OSC estimates a search yield of more than 5000 pages.

(b) *Denial of request.* OSC will notify the requestor in writing of its determination to grant or deny in full or in part a FOIA request.

(c) *Adverse determinations.* Adverse determinations, or denials of requests, consist of: A determination to withhold any requested record in whole or in part; that a requested record does not exist or cannot be located; that a record is not readily reproducible in the form or format sought by the requestor; that the request does not seek a record subject to the FOIA; a determination on any disputed fee matter; or a denial of a request for expedited treatment. A notification to a requestor of an adverse determination on a request shall include:

(1) A brief statement of the reason(s) for the denial of the request, including any FOIA exemption applied by OSC in denying the request; and

(2) A statement that the denial may be appealed under § 1820.6(a), with a description of the requirements of that subsection.

(d) *Dispute resolution program.* OSC shall inform FOIA requestors at all stages of the FOIA process of the availability of dispute resolution services provided by the FOIA Public Liaison or by NARA's OGIS.

## **§ 1820.6 Appeals.**

(a) *Appeals of adverse determinations.* A requestor may appeal an adverse determination to OSC's Office of General Counsel. The appeal must be in writing, and must be submitted either:

(1) By e-mail to: [foiaappeal@osc.gov](mailto:foiaappeal@osc.gov), or other electronic means as described on the FOIA page of OSC's Web site (<https://osc.gov/FOIA>); or

(2) By mail to: U.S. Office of Special Counsel, Office of General Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(b) *Submission and content.* The Office of General Counsel must receive the appeal within ninety (90) calendar days of the date of the adverse determination letter. The appeal letter and envelope or e-mail subject line should be clearly marked "FOIA Appeal." The appeal must clearly identify the OSC determination (including the assigned FOIA request number, if known) being appealed. OSC will not ordinarily act on a FOIA appeal if the request becomes a matter of FOIA litigation.

(c) *Responses to appeals.* Ordinarily, OSC must issue a written appeal decision within twenty (20) business days from receipt of the appeal. A decision affirming a denial in whole or in part shall inform the requestor of the provisions for judicial review of that decision, and of the availability of dispute resolution services. If OSC's appeal decision reverses or modifies its denial, OSC's notice will state that OSC will reprocess the request in accordance with that appeal decision.

#### **§ 1820.7 Fees.**

(a) *In general.* OSC provides the first two hours of search time and the first 100 pages of duplication free of charge to all requestors. In exceptional circumstances, OSC may charge fees after determining that unusual circumstances exist. At the discretion of the Special Counsel, OSC may exempt

certain requestors from search and duplication fees, including PPP complainants and subjects; Hatch Act complainants and subjects; Hatch Act advisory opinion requestors; whistleblowers; and USERRA complainants. OSC charges commercial users for search, review, and duplication fees under the FOIA in accordance with paragraph (c) of this section, except where a waiver or reduction of fees is granted under paragraph (h) of this section. OSC charges duplication fees, but not search fees, to educational or non-commercial scientific institutions; and to representative of the news media or news media requestors. OSC charges both search fees and duplication fees to all other requestors. If an exempted requestor abuses its exempt fee status to file numerous, duplicative, and/or voluminous FOIA requests, OSC may suspend the requestor's exempt status and charge search and duplication fees. OSC may require up-front payment of fees before sending copies of requested records to a requestor. Requestors must pay fees by submitting to OSC's FOIA Officer a check or money order made payable to the Treasury of the United States. *See generally Uniform Freedom of Information Act Fee Schedule and Guidelines* (hereinafter *OMB Fee Guidelines*), 52 FR 10012 (Mar. 27, 1987).

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* means a request from or on behalf of an individual who seeks information for a use or purpose that furthers commercial, trade, or profit interests, which can include furthering those interests through litigation. If OSC determines that the requestor seeks to put the records to a commercial use, either because of the nature of the request or because OSC has reasonable cause to doubt a requestor's stated use, OSC shall provide the requestor with a reasonable opportunity to clarify.

(2) *Direct costs* mean those expenses that OSC incurs in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include, for example, the salary of the employee performing the work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating equipment. Direct costs do not include overhead expenses such as rent, heating, or lighting the record storage facility.

(3) *Duplication* means the reasonable direct cost of making copies of documents.

(4) *Educational institution* means any school that operates a program of scholarly research. See OMB Fee Guidelines, 52 FR 10019. To be in this category, a requestor must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(5) *Non-commercial scientific institution* means an entity that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry and are not for commercial use.

(6) *Representative of the news media* or *news media requestor* means any individual or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. A non-exhaustive list of news media entities includes print newspapers, electronic outlets for print newspapers, broadcast and cable television networks and stations, broadcast and satellite radio networks and stations, internet-only outlets, and other alternative media as methods of news delivery evolve. For “freelance” journalists to be regarded as



working for a news organization, they must demonstrate a solid basis for expecting publication through that organization, whether print or electronic. A requestor seeking to qualify as a news media requestor must not be seeking the requested records for a commercial use. The requestor's news-dissemination function is not considered to be a commercial use.

(7) *Review* means the process of examining a record located in response to a request in order to determine whether any portion of the record is exempt from release. Review includes redacting exempt material, and otherwise evaluating and preparing the records for release. Review includes time spent obtaining and considering any formal objection to release made by a business submitter under § 1820.8(f). Review does not include time spent resolving general legal or policy issues about the application of exemptions. OSC may charge for review costs in connection with commercial use requests even if a record ultimately is not released.

(8) *Search* means the process of looking for and retrieving records or information responsive to a FOIA request, as well as page-by-page or line-by-line identification of responsive information within records.

(c) *Fees*. OSC charges the following fees for responding to FOIA requests:

(1) *Search*. (i) The first two hours of search are free. OSC may charge for time spent searching even if it fails to locate responsive records, or even if OSC determines that located records are exempt from release.

(ii) OSC charges \$5.50 per quarter hour spent by clerical personnel in searching for and retrieving a requested record; \$9.00 per quarter hour of search time spent by professional personnel; and \$17.50 per quarter hour for search assistance from managerial personnel.

(iii) OSC charges the direct costs of conducting electronic searches, including the costs of operator or programmer staff time apportionable to the search.

(iv) OSC may charge additional costs in accordance with the applicable billing schedule established by NARA for requests requiring the retrieval of records from any Federal Records Center.

(2) *Duplication.* OSC charges all non-exempt requestors duplication fees after the first 100 pages. OSC's duplication fee for a standard paper photocopy of a record will be 25 cents per page. For copies produced by computer, such as discs or printouts, OSC will charge the direct costs, including staff time, of producing the copy. For other forms of duplication, OSC will charge the direct costs of that duplication.

(3) *Review.* OSC charges review fees to commercial use requestors. OSC will not charge for review at the administrative appeal level.

(d) *Notice of anticipated fees in excess of \$25.00.* OSC shall notify the requestor of the actual or estimated fees when OSC determines or estimates that fees charged under this section would exceed \$25.00, unless the requestor has indicated a willingness to pay fees at that level. The fee notice will offer the requestor an opportunity to work with OSC to reformulate or narrow the request to try to lower the anticipated fees. OSC will not conduct a search or process responsive records until the requestor agrees to pay the anticipated total fee in excess of \$25.00.

(e) *Charges for other services.* OSC will ordinarily charge an additional fee when OSC chooses as a matter of administrative discretion to provide a special service, such as shipping records by other than ordinary mail.

(f) *Aggregating separate requests.* OSC may aggregate requests and charge appropriate fees where OSC reasonably believes that a requestor or a group of

requestors seek to avoid fees by dividing a request into a series of requests.

OSC may presume that multiple such requests made within a 30-day period were divided in order to avoid fees. OSC will aggregate requests separated by more than 30 days only where a reasonable basis exists for determining that aggregation is warranted under the circumstances involved.

(g) *Advance payments.* (1) For requests other than those described in paragraphs (g)(2) and (3) of this section, OSC will not require the requestor to make an advance payment before work is begun or continued on a request. Payment owed for work already completed (that is, pre-payment after processing a request but before copies are sent to the requestor) is not an advance payment.

(2) OSC may require advance payment up to the amount of the entire anticipated fee before beginning to process the request if OSC determines or estimates that a total fee to be charged under this section will exceed \$250.00.

(3) OSC may require the requestor to make an advance payment in full of the anticipated fee where a requestor has previously failed to pay a properly charged FOIA fee within 30 business days of the date of billing.

(h) *Requirements for waiver or reduction of fees.* (1) OSC will furnish records responsive to a request without charge or at a charge reduced below that established under paragraph (c) of this section where OSC determines, based on all available information, that the requestor has demonstrated that:

(i) Release of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Release of the records is not primarily in the commercial interest of the requestor.

(2) To determine whether the first fee waiver requirement is met, OSC will consider the following factors:

(i) Whether the subject of the requested records concerns a direct and clear connection to “the operations or activities of the government,” not remote or attenuated.

(ii) Whether the release is “likely to contribute” to an understanding of government operations or activities. The releasable portions of the requested records must be meaningfully informative about government operations or activities in order to be “likely to contribute” to an increased public understanding of those operations or activities. The release of records already in the public domain is unlikely to contribute to such understanding.

(iii) Whether release of the requested records will contribute to “public understanding.” The release must contribute to the understanding of a reasonably broad audience of individuals interested in the subject. OSC shall consider a requestor's expertise in the subject area and ability and intention to effectively convey information to the public. A representative of the news media presumptively satisfies this consideration.

(iv) Whether the release is likely to contribute “significantly” to public understanding of government operations or activities. The requestor must demonstrate that the release would significantly enhance the public's understanding of the subject in question.

(3) To determine whether the second fee waiver requirement is met, OSC will consider the following factors:

(i) Whether the requestor has a commercial interest that would be furthered by the requested release. OSC shall consider any commercial interest of the requestor (with reference to the definition of “commercial use” in paragraph (b)(1)

of this section), or of any individual on whose behalf the requestor may be acting, that would be furthered by the requested release. Requestors shall be given an opportunity to provide explanatory information about this consideration.

(ii) Whether any identified public interest is greater in magnitude than that of any identified commercial interest in release. OSC ordinarily shall presume that a news media requestor has satisfied the public interest standard. Release to data brokers or others who merely compile and market government information for direct economic return shall be presumed not to primarily serve the public interest.

(4) Where only a portion of the records to be released satisfies the requirements for a waiver of fees, a waiver shall be granted for that portion.

(5) Requests for the waiver or reduction of fees should address the factors listed in paragraphs (h)(1), (2), and (3) of this section, insofar as they apply to each request. OSC fee reduction or waiver decisions may consider the cost-effectiveness of its allocation of administrative resources.

(i) *No assessment of fees.* OSC may not assess any search fees if it misses the statutory 20 business-day deadline to respond to the request, except under paragraphs (i)(1) and (2) of this section.

(1) If OSC determined that unusual circumstances apply and OSC provided a timely written notice to the requestor, OSC may extend the 20-day deadline by 10 business days. OSC may not assess any search fees, however, if it misses the extended deadline.

(2) OSC may charge search fees if the search yield would exceed 5,000 pages, and if OSC provides a timely written notice to the requestor.

## **§ 1820.8 Business information.**

(a) *In general.* Business information obtained by OSC from a submitter may be released only pursuant to this section.

(b) *Definitions.* For purposes of this section:

(1) *Business information* means trade secrets and commercial or financial information obtained by OSC from a submitter that may be protected from release under FOIA Exemption 4. 5 U.S.C. 552(b)(4).

(2) *Submitter* means any individual or entity from whom OSC obtains business information, directly or indirectly.

(c) *Designation of business information.* A submitter of business information must use good-faith efforts to designate, by appropriate markings, any portion of its submission that it considers to be protected from release under exemption 4.

(d) *Notice to submitters.* OSC shall provide a submitter with prompt written notice of a FOIA request or administrative appeal that appears to seek confidential business information wherever required under paragraph (e) of this section, except as provided in paragraph (h) of this section, in order to give the submitter an opportunity to object to release of any specified portion of those records under paragraph (f) of this section. The notice shall either describe the confidential business information requested or include copies of the requested records or record portions containing the information.

(e) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The submitter designated the records in good faith as considered protected from release under exemption 4; or

(2) OSC has reason to believe that the records or portions of records may be protected from release under exemption 4.

(f) *Opportunity to object to release.* OSC will allow a submitter a reasonable time to respond to the notice described in paragraph (d) of this section and will

specify that time period within the notice. The submitter must submit any objections to release in a detailed written statement. The statement must specify all grounds for withholding any portion of the records under any exemption of the FOIA and, in the case of exemption 4, it must show why the information contained in the record is privileged or confidential. Submitters who fail to respond timely to the notice are deemed to have consented to release of the records. Information provided by a submitter under this paragraph may itself be subject to release under FOIA.

(1) *Notice of intent to release.* OSC shall consider a submitter's objections and specific grounds for non-release in deciding whether to release business information. If OSC decides to release business information over the objection of a submitter, OSC shall provide written notice including the reason(s) why OSC overruled the submitter's objections; a description of the business information to be released; and a reasonable specified release date.

(2) [Reserved]

(g) *Exceptions to notice requirements.* The notice requirements of paragraphs (d) and (e) of this section shall not apply if:

(1) OSC determines that the information should not be released;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Release of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600; or

(4) The designation made by the submitter under paragraph (c) of this section appears obviously frivolous—except that, in such a case, OSC shall, within a

reasonable time prior to a specified release date, give the submitter written notice of any final decision to release the information.

(h) *Notice of FOIA lawsuit.* OSC shall promptly notify a submitter if a requestor files a lawsuit seeking to compel the release of the submitter's business information.

(i) *Corresponding notice to requestors.* OSC shall notify requestor(s): that it provided business submitters the opportunity to object to release under paragraph (d) of this section; if OSC subsequently releases the requested records under paragraph (g) of this section; and whenever a submitter files a lawsuit seeking to prevent OSC's release of business information.

#### **§ 1820.9 Other rights and services.**

This subpart does not create a right or entitlement for any individual to any service or to the release of any record other than those available under FOIA.

### **Subpart B—Touhy Regulations**

#### **§ 1820.10 Scope and purpose.**

(a) This subpart establishes policy, assigns responsibilities, and prescribes procedures with respect to the production of official information, records, or testimony by current and former OSC employees, contractors, advisors, and consultants in connection with Federal or State litigation or administrative proceedings in which OSC is not a party.

(b) OSC intends this part to:

(1) Conserve OSC employee time for conducting official business;

(2) Minimize OSC employee involvement in issues unrelated to OSC's mission;

(3) Maintain OSC employee impartiality in disputes between non-OSC litigants; and



(4) Protect OSC's sensitive, confidential information and deliberative processes.

(c) OSC does not waive the sovereign immunity of the United States when allowing OSC employees to provide testimony or records under this part.

**§ 1820.11 Applicability.**

This subpart applies to demands and requests from non-OSC litigants for testimony from current and former OSC employees, contractors, advisors, and consultants relating to official OSC information and/or for production of official OSC records or information in legal proceedings in which OSC is not a party.

**§ 1820.12 Definitions.**

The following definitions apply to this part.

(a) *Demand* means an order, subpoena, or other command of a court or other competent authority for OSC's production or release of records or for an OSC employee's appearance and testimony in a legal proceeding.

(b) *Request* means any request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

(c) *Testimony* means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, and interviews made by an individual in connection with a legal proceeding.

(d) *Records or official records and information* means all information in OSC's custody and control, relating to information in OSC's custody and control, or acquired by an OSC employee in the performance of official duties.

(e) *Legal proceeding* means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding.

(f) *General Counsel* means OSC's General Counsel or an individual to whom the General Counsel has delegated authority under this part.

(g) *OSC employee* or *employee* means any current or former OSC employee or contractor, including but not limited to OSC: temporary employees, interns, volunteers, consultants, and/or other advisors.

**§ 1820.13 General prohibition.**

No OSC employee may testify or produce official records or information in response to a demand or request without the General Counsel's prior written approval.

**§ 1820.14 Factors OSC will consider.**

The General Counsel has discretion to grant an employee permission to testify on matters relating to official information or produce official records and information, in response to a demand or request. The General Counsel may consider whether:

- (a) The purposes of this subpart are met;
- (b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice; would assist or hinder OSC in performing its statutory duties; or would be in the best interest of OSC or the United States;
- (c) The records or testimony can be obtained from other sources;
- (d) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;
- (e) Release would violate a statute, Executive Order, or regulation; would reveal trade secrets, confidential, sensitive, or privileged information, or information that would otherwise be inappropriate for release; or would impede or

interfere with an ongoing law enforcement investigation or proceeding, or compromise constitutional rights or national security interests;

(f) Allowing such testimony or production of records would result in OSC appearing to favor one litigant over another;

(g) A substantial government interest is implicated;

(h) The demand or request is within the authority of the party making it; and/or

(i) The demand or request is sufficiently specific to be answered.

#### **§ 1820.15 Service of requests or demands.**

Requests or demands for official records or information or testimony under this subpart must be served by mail to the U.S. Office of Special Counsel, Office of General Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505; or by e-mail to [ogc@osc.gov](mailto:ogc@osc.gov). The subject line should read "Touhy Request."

#### **§ 1820.16 Requirements for litigants seeking documents or testimony.**

A litigant must comply with the following requirements when submitting a request for testimony or official records and information under this subpart. A request should be submitted before a demand is issued.

(a) The request must be in writing (email suffices) and must be submitted to the General Counsel.

(b) The written request must contain the following information:

(1) The caption of the legal or administrative proceeding, docket number, and name and address of the court or other administrative or regulatory authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal or administrative proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement addressing the factors set out in § 1820.14;

(5) A statement indicating that the information sought is not available from another source;

(6) If testimony is requested, the intended use of the testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requestor and other parties will require of each OSC employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) OSC reserves the right to require additional information to complete the request where appropriate.

(d) The request should be submitted at least 14 days before the date that records or testimony is required.

(e) The General Counsel may deny a request for records or testimony based on a requestor's failure to cooperate in good faith to enable the General Counsel to make an informed decision.

(f) The request should state that the requestor will provide a copy of the OSC employee's testimony free of charge and that the requestor will permit OSC to have a representative present during the employee's testimony.

**§ 1820.17 Processing requests or demands.**

(a) Absent exigent circumstances, OSC will issue a determination within 10 business days after the General Counsel received the request or demand.

(b) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of OSC or the United States, or for other good cause.

(c) On request, OSC may certify that records are true copies in order to facilitate their use as evidence.

**§ 1820.18 Restrictions that apply to testimony.**

(a) The General Counsel may impose conditions or restrictions on OSC employee testimony including, for example:

- (1) Limiting the areas of testimony;
- (2) Requiring the requestor and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal;
- (3) Requiring that the transcript will be used or made available only in the particular legal proceeding for which testimony was requested.

(b) OSC may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify under this part, employees may testify as to facts within their personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not;

- (1) Reveal confidential or privileged information; or
- (2) For a current OSC employee, testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of OSC unless testimony is being given on behalf of the United States (*see also* 5 CFR 2635.805).

(d) The scheduling of an employee's testimony, including the amount of time that the employee will be made available for testimony, will be subject to OSC's approval.

**§ 1820.19 Restrictions that apply to released records.**

(a) The General Counsel may impose conditions or restrictions on the release of official OSC records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure.

(b) If the General Counsel so determines, original OSC records may be presented for examination in response to a request, but they may not be presented as evidence or otherwise used in a manner by which they could lose their identity as official OSC records, nor may they be marked or altered.

**§ 1820.20 Procedure in the event a decision is not made prior to the time a response is required.**

If a requestor needs a response to a demand or request before the General Counsel makes a determination whether to grant the demand or request, the employee upon whom the demand or request is made, unless otherwise advised by the General Counsel, will appear, if necessary, at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents at this time, and respectfully decline to comply with the demand or request, citing *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

**§ 1820.21 Fees.**

(a) *Witness fees.* OSC may assess fees for attendance by a witness. Such fees will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based on 28

U.S.C. 1821, and upon the rule of the federal district closest to the location where the witness will appear. Such fees will include the costs of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding, plus travel costs.

(b) *Payment of fees.* A requestor must pay witness fees for current OSC employees and any record certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the United States Department of Treasury.

#### **§ 1820.22 Final determination.**

The General Counsel will notify the requestor and, when appropriate, the court or other body of the final determination, the reasons for the response to the request or demand, and any conditions that the General Counsel may impose on the testimony of an OSC employee or the release of OSC records or information. The General Counsel has the sole discretion to make the final determination regarding requests to employees for testimony or production of official records and information in litigation in which OSC is not a party. The General Counsel's decision exhausts administrative remedies for purposes of release of the information.

#### **§ 1820.23 Penalties.**

(a) An employee who releases official records or information or gives testimony relating to official information, except as expressly authorized by OSC, or as ordered by a court after OSC has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former OSC employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current OSC employee who testifies or produces official records and information in violation of this subpart may be subject to disciplinary action.

**§ 1820.24 Conformity with other laws; other rights.**

This regulation is not intended to conflict with 5 U.S.C. 2302(b)(13). This subpart does not create any right, entitlement, or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

4. Revise part 1830 to read as follows:

**PART 1830—PRIVACY ACT REGULATIONS**

Sec.

1830.1 Scope and purpose.

1830.2 Definitions.

1830.3 Requirements for making Privacy Act requests.

1830.4 Medical records.

1830.5 Requirements for requesting amendment of records.

1830.6 Appeals.

1830.7 Exemptions.

1830.8 Fees.

1830.9 Accounting for disclosures.

1830.10 Conditions of disclosure.

Authority: 5 U.S.C. 552a(f), 1212(e).

**§ 1830.1 Scope and purpose.**

(a) This part contains rules and procedures followed by OSC in processing requests for records under the Privacy Act. Further information about access to OSC records generally is available on OSC's website at <https://osc.gov/Privacy>.

(b) This part implements the Privacy Act of 1974, codified at 5 U.S.C. 552a, by establishing OSC policies and procedures for the release and maintenance of certain systems of records. See 5 U.S.C. 552a(f). This part also establishes policies and procedures for an individual to correct or amend their record if they believe it is not accurate, timely, complete, or relevant or necessary to accomplish an OSC function.



(c) OSC personnel protected by the Privacy Act include all staff, experts, contractors, consultants, volunteers, interns, and temporary employees.

(d) Other individuals engaging with OSC protected by the Privacy Act include, but are not limited to, PPP complainants, Hatch Act complainants, subjects of Hatch Act complaints, Hatch Act advisory opinion requesters, whistleblowers filing disclosures under 5 U.S.C. 1213, and USERRA complainants

(e) This part does not:

(1) Apply to OSC record systems that are not Privacy Act Record Systems.

(2) Make any records available to individuals other than:

(i) individuals who are the subjects of the records;

(ii) individuals who can prove they have consent of subject individual; or

(iii) individuals acting as legal representatives on behalf of such subject individuals.

(3) Make available information compiled by OSC in reasonable anticipation of court litigation or formal administrative proceedings. The availability of such information, including to any subject individual or party to such litigation or proceeding, shall be governed by applicable constitutional principles, rules of discovery, privileges, and part 1820 of this chapter; or

(4) Apply to personnel records maintained by the Human Capital Office of OSC. Those records are subject to regulations of the Office of Personnel Management in 5 CFR parts 293, 294, and 297.

## **§ 1830.2 Definitions.**

As used in this part:

(a) *Access* means availability of a record to a subject individual.

(b) *Disclosure* means the availability or release of a record.

(c) *Maintain* means to maintain, collect, use, or disseminate when used in connection with the term “record;” and to have control over or responsibility for a system of records when used in connection with the term “system of records.”

(d) *Notification* means communication to an individual whether or not they are a subject individual.

(e) *Record* means any item, collection, or grouping of information about an individual that is maintained by OSC, including but not limited to the individual's education, financial transactions, medical history, criminal, or employment history, that contains a name or an identifying number, symbol, or other identifying particular assigned to the individual. When used in this part, record means only a record that is in a system of records.

(f) *Release* means making available all or part of the information or records contained in an OSC system of records.

(g) *Responsible OSC official* means the officer listed in a notice of a system of records as the system manager or another individual listed in the notice of a system of records to whom requests may be made, or the designee of either such officer or individual.

(h) *Subject individual* means that individual to whom a record pertains.

(i) *System of records* means any group of records under the control of OSC from which a record is retrieved by personal identifier such as the name of the individual, number, symbol or other unique retriever assigned to the individual. Single records or groups of records which are not retrieved by a personal identifier are not part of a system of records. See 5 U.S.C. 552a(a)(5).

### **§ 1830.3 Requirements for making Privacy Act requests.**

(a) *Submission of requests.* A request for OSC records under the Privacy Act must be made in writing. The request must be sent:

(1) By e-mail to: *foiarequest@osc.gov*; or

(2) By mail to: U.S. Office of Special Counsel, Chief Privacy Officer, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(3) Both the request letter and envelope or e-mail should clearly be marked "Privacy Act Request." A Privacy Act request is deemed received by OSC when it reaches the Chief Privacy Officer.

(b) *Description of records sought.* Requestors must describe the records sought in enough detail for OSC to locate them with a reasonable amount of effort, including, where known, data such as the date, title or name, author, recipient, and subject matter of the requested record.

(c) *Proof of identity.* OSC requires proof of identity from requestors seeking their own files, preferably a government-issued document bearing the subject individual's photograph. OSC requires a signed consent from the subject individual to release records to an individual's representative.

(d) *Freedom of Information Act processing.* OSC also processes all Privacy Act requests for access to records under the Freedom of Information Act, 5 U.S.C. 552, by following the rules contained in part 1820 of this chapter.

#### **§ 1830.4 Medical records.**

When a request for access involves medical records that are not otherwise exempt from disclosure, OSC may advise the requesting individual that OSC will only provide the records to a physician the individual designates in writing. Upon receipt of the designation, the physician will be permitted to review the records or to receive copies by mail upon proper verification of identity.

#### **§ 1830.5 Requirements for requesting amendment of records.**

(a) *Submission of requests.* Individuals may request amendment of records pertaining to them that are subject to amendment under the Privacy Act and this part. The request must be sent:

(1) By e-mail to: *info@osc.gov*; or

(2) By mail to: Chief Privacy Officer, U.S. Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(3) Both the request letter and envelope or e-mail should be clearly marked "Privacy Act Amendment Request." Whether sent by mail or e-mail, a Privacy Act amendment request is considered received by OSC when it reaches the Chief Privacy Officer.

(b) *Description of amendment sought.* Requests for amendment should include the identification of the records together with a statement of the basis for the requested amendment and all available supporting documents and materials. The request needs to articulate whether information should be added, deleted, or substituted with another record and clearly articulate the reason for believing that the record should be corrected or amended.

(c) *Proof of identity.* Rules and procedures set forth in § 1830.3 apply to requests made under this section.

(d) *Acknowledgement and response.* Requests for amendment shall be acknowledged by OSC no later than ten (10) business days after receipt by the Chief Privacy Officer and a determination on the request shall be made promptly.

(e) *What will not change.* The Privacy Act amendment or correction process will not be used to alter, delete, or amend information which is part of a determination of fact or which is evidence received in the record of a claim in any form of an administrative appeal process. Disagreements with these determinations are to be resolved through the assigned OSC Program Office.

(f) *Notice of error.* If the record is wrong, OSC will correct it promptly. If wrong information was disclosed from the record, we will tell those of whom we are aware received that information that it was wrong and will give them the correct information. This will not be necessary if the change is not due to an error—e.g., a change of name or address.

(g) *Record found to be correct.* If the record is correct, OSC will inform you in writing of the reason why we refuse to amend your record and we will also inform you of your right to appeal the refusal and the name and address of the official to whom you should send your appeal.

(h) *Record of another government agency.* If you request OSC to correct or amend a record governed by the regulation of another government agency, we will forward your request to such government agency for processing and we will inform you in writing of the referral.

#### **§ 1830.6 Appeals.**

(a) *Appeals of adverse determinations.* A requestor may appeal a denial of a Privacy Act request for access to or amendment of records to OSC's Office of General Counsel. The appeal must be in writing, and be sent:

(1) By e-mail to: *info@osc.gov*; or

(2) By mail to: U.S. Office of Special Counsel, Office of General Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036-4505.

(3) The appeal must be received by the Office of General Counsel within 45 calendar days of the date of the letter denying the request. Both the appeal letter and envelope or e-mail should be clearly marked "Privacy Act Appeal." An appeal is considered received by OSC when it reaches the Office of General Counsel. The appeal letter may include as much or as little related information as the requestor wishes, as long as it clearly identifies OSC's determination (including

the assigned request number, if known) being appealed. An appeal ordinarily will not be acted on if the request becomes a matter of litigation.

(b) *Responses to appeals.* OSC's decision on an appeal will be made in writing. A final determination will be issued within 20 business days—unless OSC shows good cause to extend the 20-day period.

#### **§ 1830.7 Exemptions.**

OSC exempts investigatory material from records subject to Privacy Act record requests or amendment of records requests. This exemption aims to prevent interference with OSC's inquiries into matters under its jurisdiction, and to protect identities of confidential sources of information. OSC also reserves the right to assert exemptions for records received from another agency that could be properly claimed by that agency. OSC may exempt any information compiled in reasonable anticipation of a legal action or proceeding.

#### **§ 1830.8 Fees.**

Requests for records under this section shall be subject to the fees set forth in part 1820 of this chapter.

#### **§ 1830.9 Accounting for disclosures.**

OSC will maintain an accounting of all releases of a record for six (6) years or for the life of the record in accordance with the General Records Schedule, whichever is longer—except that, we will not make accounting for:

- (a) Releases of your record made with your consent;
- (b) To those officers and employees of the Office of Special Counsel who have a need for the record to perform their duties; and
- (c) To those required to be released under the Freedom of Information Act, 5 U.S.C. 552, and part 1820 of this chapter.

#### **§ 1830.10 Conditions of disclosure.**

OSC shall not release any record that is contained in a system of records to any individual or to another agency, except as follows:

(a) *Consent to release by the subject individual.* Except as provided in paragraphs (b) and (c) of this section authorizing releases of records without consent, no release of a record will be made without the consent of the subject individual. The consent shall be in writing and signed by the subject individual. The consent shall specify the individual, agency, or other entity to whom the record may be released, which record may be released and, where applicable, during which time frame the record may be released. The subject individual's identity and, where applicable, the identity of the individual to whom the record is to be released shall be verified as set forth in § 1830.3(c).

(b) *Releases without the consent of the subject individual.* The releases listed in this paragraph may be made without the consent of the subject individual, including:

(1) To those officers and employees of the Office of Special Counsel who have a need for the record to perform their duties.

(2) To those required to be released under the Freedom of Information Act, 5 U.S.C. 552, and part 1820 of this title.

(3) To the entities listed in in the Privacy Act at 5 U.S.C. 552a(b)(1) through (12).

5. Revise part 1850 to read as follows:

**PART 1850—ENFORCEMENT OF NONDISCRIMINATION ON THE BASIS OF DISABILITY IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE OFFICE OF SPECIAL COUNSEL**

Sec.

1850.101 Purpose.

1850.102 Application.

1850.103 Definitions.

1850.104-1850.109 [Reserved]

1850.110 Notice.

1850.111-1850.119 [Reserved]

1850.120 General prohibitions against discrimination against individuals with disabilities.

1850.121-1850.129 [Reserved]

1850.130 Employment of qualified individuals with disabilities.

1850.131-1850.139 [Reserved]

1850.140 Program accessibility: Discrimination against qualified individuals with disabilities prohibited.

1850.141-1850.149 [Reserved]

1850.150 Program accessibility: Existing facilities.

1850.151 Program accessibility: New construction and alterations.

1850.152-1850.159 [Reserved]

1850.160 Communications.

1850.161-1850.169 [Reserved]

1850.170 Compliance procedures.

1850.171-1850.999 [Reserved]

Authority: 29 U.S.C. 794.

### **§ 1850.101 Purpose.**

The purpose of this part is to implement section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of disability in programs or activities conducted by Executive agencies or the United States Postal Service.

### **§ 1850.102 Application.**

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with disabilities in the United States.

### **§ 1850.103 Definitions.**

(a) *Auxiliary aids* means services or devices that enable individuals with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for individuals with impaired vision include readers, Braille materials, audio recordings, and other similar services and devices. Auxiliary aids useful for individuals with impaired hearing include



telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf individuals (TDDs), interpreters, notetakers, written materials, and other similar services and devices.

(b) *Complete complaint* means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on the complainant's behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

(c) *Days* means calendar days, unless otherwise stated.

(d) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

(e) *Historic properties* means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

(f) *Individual with a disability* means any individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. The following phrases used in this definition are further defined as follows:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including

speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(iii) Also, physical and mental impairment includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* include functions such as—

(i) Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, writing, communicating, interacting with others, and working; and

(ii) The operation of a *major bodily function*, such as the functions of the immune system, special sense organs and skin, normal cell growth, and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive systems. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (i) of this definition but is treated by the agency as having such an impairment.

(g) *Qualified individual with a disability* means—

(1) With respect to any agency program or activity under which an individual is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(3) Qualified individuals with disabilities as that term is defined for purposes of employment in 29 CFR 1614.203, which is made applicable to this part by § 1850.130.

(h) *Section 504* means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, Section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

**§§ 1850.104-1850.109 [Reserved]**

**§ 1850.110 Notice.**

The agency shall make available to all interested individuals information regarding the provisions of this part and its applicability to the programs or activities conducted by the agency as necessary to apprise such individuals of the protections assured them by Section 504 and this part.

**§§ 1850.111-1850.119 [Reserved]**

**§ 1850.120 General prohibitions against discrimination against individuals with disabilities.**

(a) No qualified individual with a disability shall, on the basis of such disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability—

(i) Deny a qualified individual with a disability the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with a disability with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with disabilities or to any class of individuals with disabilities than is provided to others

unless such action is necessary to provide qualified individuals with disabilities with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with a disability the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) A qualified individual with a disability may not be excluded from participation in any of the agency's programs or activities, even though permissibly separate or different programs or activities exist.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with disabilities to discrimination on the basis of disability; or

(ii) Defeat or substantially impair accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with disabilities from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency, or;

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with disabilities.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with disabilities to discrimination on the basis of disability.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with disabilities to discrimination on the basis of disability, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with disabilities to discrimination on the basis of disability. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nondisabled individuals from the benefits of a program limited by Federal statute or Executive order to individuals with disabilities or the exclusion of a specific class of individuals with disabilities from a program limited by Federal statute or Executive order to a different class of individuals with disabilities is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities.

**§§ 1850.121-1850.129 [Reserved]**

**§ 1850.130 Employment of qualified individuals with disabilities.**

No qualified individual with a disability shall, on the basis of such disability, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1614, shall apply to employment in federally conducted programs or activities.

**§§ 1850.131-1850.139 [Reserved]**

**§ 1850.140 Program accessibility: Discrimination against qualified individuals with disabilities prohibited.**

Except as otherwise provided in § 1850.150, no qualified individual with disabilities shall, because the agency's facilities are inaccessible to or unusable by individuals with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

**§§ 1850.141-1850.149 [Reserved]**

**§ 1850.150 Program accessibility: Existing facilities.**

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with disabilities;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 1850.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or the agency head's designee after considering all agency resources available for use in the

funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General*. The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with disabilities. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with disabilities in the most integrated setting appropriate.

(2) *Historic preservation programs*. In meeting the requirements of § 1850.150(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with disabilities. In cases where a physical alteration to an historic property is not required because of §



1850.150(a)(2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning individuals to guide individuals with disabilities into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

**§ 1850.151 Program accessibility: New construction and alterations.**

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with disabilities. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

**§§ 1850.152-1850.159 [Reserved]**

**§ 1850.160 Communications.**

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with a disability.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with parties by telephone, telecommunication devices for deaf individuals or equally effective telecommunication systems shall be used to communicate with individuals with impaired hearing.

(b) The agency shall ensure that interested individuals, including individuals with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with this section would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or the agency head's designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but

would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits and services of the program or activity.

**§§ 1850.161-1850.169 [Reserved]**

**§ 1850.170 Compliance procedures.**

(a) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791). See Directive No. 51, Equal Employment Opportunity, Non-Discrimination Policy, for procedural information.

(b) All complaints of discrimination on the basis of disability in programs and activities conducted by the agency shall be filed under the procedures described in this paragraph.

(1) *Who may file.* Any individual who believes that they have been subjected to discrimination prohibited by this part, or an authorized representative of such individual, may file a complaint. Any individual who believes that any specific class of individuals has been subjected to discrimination prohibited by this part and who is a member of that class or the authorized representative of a member of that class may file a complaint. A charge on behalf of an individual or member of a class of individuals claiming to be aggrieved may be made by any individual, agency, or organization.

(2) *Where and when to file.* Complaints shall be filed with the Director, Office of Equal Employment Opportunity (EEO Director), U.S. Office of Special Counsel, 1730 M Street NW, Suite 218, Washington DC 20036 within 35-calendar days of the alleged act of discrimination. A complaint filed by personal delivery is considered filed on the date it is received by the EEO Director. The

date of filing by facsimile or e-mail is the date the facsimile or e-mail is sent. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the agency is closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service.

(3) *Acceptance of complaint.* (i) The agency shall accept a complete complaint that is filed in accordance with paragraph (b) of this section and over which it has jurisdiction. The EEO Director shall notify the complainant of receipt and acceptance of the complaint.

(ii) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate entity.

(iii) If the EEO Director receives a complaint that is not complete, the Director shall notify the complainant that additional information is needed. If the complainant fails to complete the complaint and return it to the EEO Director within 15 days of the complainant's receipt of the request for additional information, the EEO Director shall dismiss the complaint with prejudice and shall inform the complainant.

(4) *Initial decision.* Within 180 days of the receipt of a complete complaint, the EEO Director shall notify the complainant of the results of the investigation in an initial decision containing—

- (i) Findings of fact and conclusions of law;
- (ii) When applicable, a description of a remedy for each violation found; and
- (iii) A notice of the right to appeal.

(5) *Appeals.* Any appeal of the EEO Director's initial decision must be filed with the Principal Deputy Special Counsel (PDSC), U.S. Office of Special Counsel, 1730 M Street NW, Suite 218, Washington, DC 20036 by the complainant within 35 days of the date the EEO Director issues the decision required by paragraph (b)(4) of this section. The agency may extend this time for good cause when a complainant shows that circumstances beyond the complainant's control prevented the filing of an appeal within the prescribed time limit. An appeal filed by personal delivery is considered filed on the date it is received by the PDSC. The date of filing by facsimile is the date of the facsimile. The date of filing by mail is determined by the postmark date; if no legible postmark date appears on the mailing, the submission is presumed to have been mailed five days (excluding days on which the agency is closed for business) before its receipt. The date of filing by commercial overnight delivery is the date the document was delivered to the commercial overnight delivery service. The appeal should be clearly marked "Appeal of Section 504 Decision" and must contain specific objections explaining why the complainant believes the initial decision was factually or legally wrong. A copy of the initial decision being appealed should be attached to the appeal letter.

(6) *Appeal decision.* The PDSC shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the PDSC needs additional information from the complainant, the PDSC shall have 60 days from the date the additional information is received to make a determination on the appeal.

(7) *Extension of time.* The time limits cited in paragraphs (b)(2) and (5) of this section may be extended for an individual case when the PDSC determines there

is good cause, based on the particular circumstances of that case, for the extension.

(8) *Delegation of authority.* The agency may delegate its authority for conducting complaint investigations to other Federal agencies or may contract with a nongovernmental investigator to perform the investigation, but the authority for making the final determination may not be delegated to another entity.

(c) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with disabilities.

**§§ 1850.171-1850.999 [Reserved]**

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